United States Court of Appeals

for the Second Circuit

APPENDIX

77-4117

APPENDIX

67 T. C. No. 63

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Pls

UNITED STATES TAX COURT

JOSEPH ANASTASIO, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 7134-74. Filed February 16, 1977.

In 1970, petitioner won $100,000 in a lottery. Because petitioner was a minor at that time, under the applicable state law, the prize money was paid in 1970 to petitioner's parents as custodians under the state's Uniform Gifts to Minors Act. The prize proceeds, and interest earned in 1970 thereon, were turned over to petitioner in 1971. Held, the prize money was income to petitioner in 1970. Held further, the prize money, held by petitioner's parents as custodians under the Uniform Gifts to Minors Act, did not constitute the corpus of a trust. Held further, interest earned on the prize money was taxable to petitioner in the year earned, not the year it was turned over to him by his parents.

Stanley Pressment, for the petitioner.

Michael A. Zimmerman and Richard M. Campbell, for the respondent.

UNITED STATES COURT OF APPEALS
FILED
AUG 17 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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OPINION

TANNENWALD, Judge: Respondent determined a deficiency in petitioner's Federal income tax for the year 1970 in the amount of $61,086.39. The sole issue is whether a lottery prize won by a minor, together with income earned thereon, which is made payable under the applicable state law to his parents as custodians, constitutes income in the year the prize is awarded or in the year the money is actually turned over to him by his parents.

All of the facts have been stipulated and are found accordingly. The stipulation of facts and attached exhibits are incorporated herein by this reference.

Petitioner resided in New York, New York, at the time the petition herein was filed. His Federal income tax return for the year 1970 was filed with the Internal Revenue Service Center at Andover, Massachusetts.

In February, 1970, petitioner, who was born on September 1, 1950, purchased in his own name a New York state lottery ticket for $1.00 and won

$100,000. Since petitioner was a minor, the State of New York, pursuant to sec. 9553, N.Y. Unconsol. Laws (McKinney 1974), issued a check dated April 13, 1970, in that amount to Carmine and Rafaela Anastasio, who were petitioner's parents.

The $100,000 was used to purchase an interest-bearing note and a savings bond in the names of Carmine and Rafaela Anastasio as custodians for Joseph Anastasio, under the New York Uniform Gifts to Minors Act. The total interest earned by the note and bond in 1970 was $4,581.

At no time during 1970 did petitioner or his parents execute, or have executed on their behalf, any trust indenture for the benefit of petitioner. Petitioner's parents filed a United States Fiduciary Income Tax Return, as custodians for petitioner, for the taxable year ending March 31, 1971. In this return, $104,581 was included in gross income, but was shown as having been distributed to petitioner within 65 days of the close of the taxable year, with the result that the return showed no income tax due.

The distribution was made because petitioner's parents, pursuant to New York Estates, Powers and Trusts Law (hereinafter EPTL) sec. 7-4.3(b) (McKinney 1967), determined that the distribution would economically benefit petitioner by enabling him to average his income for tax purposes. Joseph reported the $104,581 on his Federal income tax return for 1971, the first year in which he was considered eligible to average his income under sections 1301 et seq.[1]

The basic issue involved herein is whether, as respondent contends, petitioner received sufficient economic and financial benefits in 1970 to cause the lottery prize and the interest thereon to be taxable to him in that year, or whether, as petitioner argues, he was precluded from possessing the attributes of ownership and enjoyment in 1970, to such an extent that he should not be taxed until he received the money in 1971 because the prize was paid to his parents as custodians. For the reasons hereinafter

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[1] All section references are to the Internal Revenue Code of 1954, as amended and in effect during the taxable years in question. The question of petitioner's right to average in 1971 is not before us and we express no opinion thereon.

stated, we hold for respondent.

The applicable New York State Lottery for Education Law provided that if the winner of the lottery was a minor and the prize was $5,000 or more, payment would be made to the minor by depositing the funds to the credit of an adult member of the minor's family as custodian for the minor. N.Y. Unconsol. Laws. sec. 9553(b) (McKinney 1974). The powers and duties of such a custodian are set forth in part four of article seven of the Estates, Powers and Trusts Law. Under those provisions, the custodian can use the funds, in his complete discretion, "for the support, maintenance, education, and benefit of the minor", EPTL sec. 7-4.3(b); the minor, if he has attained the age of fourteen years, can petition the court to order the custodian to expend the funds held by him for his support, maintenance, or education, EPTL sec. 7-4.3(c); and the custodian must pay whatever amount is not expended to the minor upon his reaching twenty-one years, EPTL sec. 7-4.3(d).

The State of New York issued its check for $100,000 on April 13, 1970, less than seventeen

months prior to Joseph's twenty-first birthday. The only limitations on his total enjoyment of the prize money were the powers of his parents as custodians to invest the funds as they saw fit and to distribute the funds to Joseph or to hold them for him during that seventeen-month period.

In Stephen W. Pulsifer, 64 T.C. 245 (1975), winnings from the Irish Sweepstakes were deposited in a bank account for the benefit of a minor until he reached 21 years of age or until application for release of the funds was made on his behalf by his legal representative. We held that the minor was taxable in the year the amounts were deposited for his benefit and not in the year of actual receipt by him. Cf. Candido Jacuzzi, 61 T.C. 262 (1973); E. T. Sproull, 16 T.C. 244 (1951), affd. per curiam 194 F.2d 541 (6th Cir. 1952). See also Rev. Rul. 67-203, 1967-1 C.B. 105.

Petitioner seeks to distinguish Pulsifer on the ground that it was not clear in that case whether the minor's rights were assignable and that in the instant case Joseph could not assign his right to

the prize money but could only petition to a court for its release to him or expenditure for his support, maintenance, or education. Putting aside the fact that the applicable New York law does not specifically prohibit an assignment by Joseph and assuming without deciding for purposes of decision herein that petitioner was so prohibited, we are satisfied, as we were in Pulsifer (see 64 T.C. at 247), that petitioner's position is without merit. The mere absence of a right to assign has long been held not to constitute a valid reason for reaching a different result. United States v. Drescher, 179 F.2d 863 (2d Cir. 1950); Renton K. Brodie, 1 T.C. 275 (1942). Nor were the short-term management powers vested in petitioner's parents sufficient limitations upon his enjoyment of the funds to justify postponement of taxation until their removal. See City Nat. Bank & Trust Co. v. United States, 109 F.2d 191 (7th Cir. 1940).

We hold that Stephen W. Pulsifer, supra, controls and that petitioner received sufficient benefit to be subject to tax on the prize money in 1970.

Nannie Carr Harris, 56 T.C. 1165 (1971), revd. 477 F.2d 812 (4th Cir. 1973), relied upon by petitioner, is distinguishable both on its facts and on its legal theory. Our decision in that case was based upon the doctrine of constructive receipt, a concept that significantly differs from the theory of economic benefit (see E. T. Sproull, 16 T.C. at 246-247),[2] although admittedly the decided cases have not always been a model of clarity in respect of the distinction. See 2 Mertens, Law of Federal Income Taxation, sec. 10.13 (1974 rev.). Since we rest our decision herein on the economic benefit theory, we have no need to consider whether we will follow the reversal of our decision in Harris.

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[2] The cases of Drysdale v. Commissioner, 277 F.2d 413 (6th Cir. 1960), revg. 32 T.C. 378 (1959), and Aaron Watson, T.C. Memo. 1974-63, also relied upon by petitioner, similarly involved the doctrine of constructive receipt and are, therefore, distinguishable.

We think that the foregoing rationale in respect of the prize money is equally applicable to the interest earned in 1970. Joseph argues that for tax purposes the lottery award constituted the corpus of a trust and interest earned from the award should be taxed in accordance with the provisions taxing trusts and beneficiaries. Section 641 et seq.

In enacting the Model Gifts of Securities to Minors Act, upon which the present New York Uniform Gifts to Minors Act is based, the legislature "intended to provide a single and inexpensive method for making gifts of securities to minors without the necessity of resorting to trusts and formal guardianships." In re Bushing's Custodian, 8 Misc. 2d 755, 167 NYS 2d 132, 134 (Surrogate's Ct. 1957). To effectuate this purpose, custodians under the New York Gifts to Minors Act were given broader powers and subjected to fewer restrictions than were trustees. Compare EPTL secs. 7-4.3 and 7-4.4 with EPTC sec. 11-1.1 et seq.

We see no need to elaborate on the distinctions between the powers of a trustee and those of a

custodian under the New York Uniform Gifts to Minors Act. We are satisfied that that Act does no more than create a statutory framework, within the specified area, for the exercise of the powers of a guardian to manage the property of minors. Where income-producing property was held by a parent as a natural guardian for a minor child, we have held that no trust was in existence for tax purposes, and that the income was taxable to the minor child directly. Prudence Miller Trust, 7 T.C. 1245 (1946); James T. Pettus, 45 B.T.A. 855 (1941).[3] Property held by a parent as custodian under the New York Uniform Gifts to Minors Act should be taxed in the same manner. Cf. Estate of Chrysler v. Commissioner, 361 F.2d 508, 511 (2d Cir. 1966), reversing on another issue 44 T.C. 55 (1965).

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[3] See also Dorothy Stuit, 54 T.C. 580, 582 (1970), affd. 452 F.2d 190 (7th Cir. 1971), where we indicated that a custodian was not a "trustee" in the usual sense of that term; Peirsol, "Gifts to Minors: How Effectively Has the Uniform Act Functioned?", 25th Ann. N.Y.U. Tax Inst. 1099, 1111 (1967); Uniform Gifts to Minors, 103 Trust and Estates 983, 993 (1964).

We hold that petitioner is taxable on the interest earned in 1970.

Decision will be entered for respondent.

UNITED STATES TAX COURT

Joseph Anastasio, Petitioner,	:	
v.	:	Docket No. 7134-74
Commissioner of Internal Revenue, Respondent.	:	

REPLY BRIEF FOR PETITIONER

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UNITED STATES TAX COURT

Joseph Anastasio, Petitioner, v. Commisstioner of Internal Revenue, Respondent.	Docket No. 7134-74

REPLY BRIEF FOR PETITIONER

Preliminary Statement

Petitioner's opening brief has heretofore been filed on August 31, 1976 pursuant to an extension granted by an order issued by this Court. Petitioner's reply brief herein, to respondent's opening brief, is being filed as agreed upon between the parties at the hearing, with the approval of the Court.

PETITIONER'S OBJECTIONS TO
RESPONDENT'S FINDINGS OF ULTIMATE FACT

18,19. The $100,000 lottery award and interest earned thereon in 1970 does not constitute income realized by the petitioner in 1970.

ARGUMENT

I

A VALID TRUST UNDER SUBCHAPTER J OF THE INTERNAL REVENUE CODE DID EXIST DURING THE PERIOD THAT JOSEPH'S PARENTS HELD THE LOTTERY AWARD PURSUANT TO THE NEW YORK STATE LOTTERY LAW AND THE ESTATES, POWERS AND TRUSTS LAW.

Joseph, in his brief, indicated that he was limiting his argument to the issue raised in the statutory notice of deficiency, i.e., whether or not he realized taxable income in 1970. The respondent has decided to argue that the fiduciary income tax return filed by Joseph's parents for taxable year April 13, 1970 to March 31, 1971 (Stip. 9) should not be recognized. That issue, of course, is not before this Court.

Presumably, respondent raises the issue because of a private ruling issued on July 7, 1971 by the Chief, Individual Income Tax branch, Internal Revenue Service, submitted in response to a request made on behalf of Joseph's parents by counsel for Joseph (Stip. 13; Exh. 9-I). The ruling was requested because it was clear that in view of the stated position of respondent on the central issue herein, as contained in Rev. Rul. 67-203, 1967-1 C.B. 105, and the respondent's rather spotty record in taking fresh looks at his old positions, it would be more likely to convince respondent to reverse his position by having him acknowledge the existence of the trust created under the factual circumstances involved herein. Unfortunately, for the reasons stated in the private ruling letter, the respondent does not recognize the existence of the trust. This question has been further elaborated upon by the respondent in his opening brief.

While it is still the position of petitioner that the central question involved herein is whether or not Joseph realized income from the lottery award in 1970, petitioner does not intend to walk away from the argument raised by respondent herein, and submits for the Court's consideration herein his argument as to why a trust should be recognized under the circumstances of this case.

Section 641 of the Internal Revenue Code of 1954 provides in part that the taxes imposed by Subchapter J shall apply to the taxable income of estates, or of any kind of property held in trust, including:

> "(1) ...;
>
> (2) income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the Court may direct;
>
> (3) ...;
>
> (4) income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated."

Section 7701(a)(6) of the Code defines a fiduciary as a "guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person." Regulations Sec. 301.7701-4(a) provides as follows:

> "Generally speaking, an arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that the purpose of the arrange-

ment is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit."

Rev. Rul. 59-154 CB 1959-1, 160 involving the application of of Section 6012 of the Internal Revenue Code of 1954 is very much in point. This Section provides in part:

"(4) RETURNS OF ESTATES AND TRUSTS -- Returns of an estate or a trust shall be made by the fiduciary thereof."

The facts contained in the revenue ruling concerned a trust indenture which provided that if any portion of property should vest in any person before such person attained his majority, then such portion would be retained by the trustees under "a power in trust" to invest and reinvest the principal, to collect the income and apply the net income, or as much thereof as the trustees should in their sole discretion determine, to the support and maintenance of such person during his or her minority. Under the law of the jurisdiction governing the trust, legal title to such property held under a power in trust is in the beneficiaries, which, in the case of the revenue ruling, were the minor children. The Internal Revenue Service was asked to rule as to whether the trustees, holding under a power in trust, must file fiduciary income tax returns on Form 1041, or whether the income should be reported on the individual income tax return (Form 1040) of the minors.

The Internal Revenue Service held that the trustees must file

fiduciary income tax returns on Form 1041, since the minor children under the revenue ruling, while nolding legal title to the property from which the income is derived, have no control over the property held under the power in trust, or "the income derived therefrom until they attain their majority, except to the extent that the income is actually applied, in the discretion of the trustees, to their maintenance and support." The Internal Revenue Service stated in the revenue ruling that a power in trust involves a form of express fiduciary obligation, similar to that of an express trust, and differs from a mere agency which imposes no duty, but merely grants the agent an authority to act. On the other hand, a power in trust places on the grantee a duty to execute a trust in favor of a person or persons other than himself and involved the idea of a trust as much as does a trust estate.

To support its position, the Internal Revenue Service refers to the New York Court decision in Brooklyn Trust Company, 295 N.Y.S. 1007. It also makes reference to S.M. 4945, C.B. V-1, 68 (1926), which held in substance that bare legal title does not determine who shall be subject to tax, rather determination should depend upon who has complete control over the property and income arising from the fiduciary obligation.

What the respondent fails to recognize is that Subchapter J and allied Section 6012 of the Internal Revenue Code are not to be applied only to the strict legal and technical definition of a "trust" or "trustee". Rather, these provisions concentrate on whether a fiduciary

relationship exists, and this determination should depend upon who has complete control over the property and income arising from the fiduciary obligation. As a report on the Uniform Gift to Minors Act issued by the Subcommittee of the Committee on Estate and Tax Planning of the American Bar Association (See Vol. 103, No. 10 Trusts and Estates 983, October, 1964) makes clear, the powers of Joseph's parents acting as custodians are fiduciary in nature. See also "The Custodian as a Fiduciary" by Robert S. Stubbs II, Georgia State Bar Journal 175 (November 1970). The report points out that:

> "At best, or least, it can be said that the custodian's powers are fiduciary in nature. The Act imposes upon the custodian duties common to trustees-- to invest with prudence and discretion, to account, to keep records and to turn over the minor's property when the custodial relationship terminates. It also gives him rights common to trustees-- rights of possession and custody, allowance of reasonable expenses incurred in the execution of his duties, and (in the case of a custodian other than the donor) the right to be compensated for his services.[42]"

(footnote omitted)

Because Joseph's parents are fiduciaries (although not trustees), they are subject to the mandates of Subchapter J and Code section 6012. It is respectfully submitted, as demonstrated by Rev. Rul 59-154, that the Internal Revenue Code looks to the substance of the relationship between possessor and beneficiary, i.e., is it actually fiduciary in nature and not to the technical labelling of whether a trust, with its separation of legal and equitable titles, is in operation. Clearly, Joseph's parents were as much fiduciaries in re-

lationship to the lottery award legally conferred upon them as the holder of the power in trust under the facts contained in Rev. Rul. 59-154.

II

RESPONDENT'S ARGUMENT (1) WOULD VITIATE THE PROVISIONS OF CODE SEC. 446 BY NOT RECOGNIZING THE CASH BASIS METHOD BY WHICH JOSEPH REPORTED (AS WAS STIPULATED) HIS INCOME IN 1970, AND (2) CLEARLY DISTORTS THE ECONOMIC BENEFIT DOCTRINE BY EQUATING THE RIGHT TO RECEIVE INCOME WITH THE TAXABLE EVENT CAUSING ITS REALIZATION.

In Helvering v. Horst, 311 U.S. 112 (1940) the Supreme Court spoke. Respondent, by his brief, demonstrates that he has not listened. In Horst, the Supreme Court made clear that from "the beginning the revenue laws have been interpreted as defining 'realization' of income as the taxable event rather than the acquisition of the right to receive it".

Respondent concludes that Joseph (respondent's brief, p. 19), "a cash basis taxpayer, is taxable in the tax year 1970 on the economic and financial benefit derived from the absolute right to the award and interest thereon in 1970". Thus, the respondent's argument would place Joseph on an accrual basis although it has been stipulated that Joseph was a cash basis taxpayer in 1970 (Stip. 6). Clearly, Code section 446 authorizes a taxpayer to report income on a cash basis and such income must be reported in the taxable year in which such cash income is "realized".

Respondent does not appear to appreciate the limitations of the economic benefit doctrine which is intended only to be employed for determining the taxable year in which a cash basis taxpayer realizes cash or cash equivalency giving rise to the taxable event. The economic benefit

doctrine swings both ways on a fulcrum of reality, i.e., when does the substance of a transaction demonstrate a cash equivalency giving rise to a taxable event to the cash basis taxpayer during a particular taxable year? As indicated, the Supreme Court clearly stated that merely the right to receive income does not connote a realization of income to a cash basis taxpayer; otherwise, Code section 446 would not distinguish between an accrual or cash basis taxpayer.

Some other ingredient must be added to that right to receive income in order to liquify it into cash or a cash equivalent so as to cause its realization to a cash basis taxpayer. Through a process of legal alchemy, the courts on a case by case basis have analyzed the specific right to receive income which is involved in order to determine whether, through the test tube of reality, it is equivalent to cash.

Thus, in Helvering v. Horst, supra, the Supreme Court was able to determine that a taxpayer's power to gift future income was equivalent to cash in the year that such income was paid to the donee. The power to control the enjoyment of income was tantamount to realization and the taxable event was determined in the year that the income was actually paid to the donee. See "Assignment of Income: Fruit and Tree as Irrigated by the P. G. Lake Case", Lyon and Eustice 17 Tax Law Review, March 1962, p. 295.

In the area of alimony, the courts have held cash equivalency to the ex-wife where insurance premiums are paid by the husband on life

insurance policies designating the ex-wife as beneficiary, see Hyde v. Comm., 301 F.2d 279 (2d Cir. 1962) aff'd 36 T.C. 507, where the husband paid his ex-mother-in-law "for and in behalf of" his ex-wife, Robert Lehman 17 T.C. 652 (1951) acq. 1959-1 CB4; and the Internal Revenue Service itself found cash equivalency where the husband paid his ex-wife's medical expenses. Rev. Rul. 62-106, 1962-2 CB 1921.

Indeed, in the employee benefit area, respondent's own Reg. 1.72-16(b) finds cash equivalency to a pension plan participant where a life insurance contract is purchased by a qualified plan and measures such economic benefit by the allocable portion of the premium paid on the life insurance contract owned by the plan.

Sometimes, the courts confuse constructive receipt with the economic benefit doctrine, but the real question which the Courts seek to resolve in each case is whether what the cash basis taxpayer has received during a taxable year is equivalent to cash. In each of the above cited instances, it was easy to determine that the taxpayer received a benefit in "money's worth" during the taxable year. In Joseph's case, as has and will be further explained, he did not.

The respondent, as expected, leans heavily on E. T. Sproull, 16 T.C. 244 (1951), aff'd 194 F.2d 541 (6th Cir. 1952). However, the Sproull case found as a fact that the taxpayer was free to assign his interest in the trust; thereby equating such free alienability (together with other factors not relevant herein) with cash. Such free alienability

was not available to Joseph. Respondent also looks to Rev. Rul 67-203, 1967-1 CB 105 for support; however, that ruling merely cites Sproull for authorizing its conclusion without any elaboration either of fact or law to explain Sproull's relevance. Indeed, the ruling's brevity is only surpassed by its superficiality.

Respondent also elaborates on this Court's decision in Stephen v. Pulsifer, 64 T.C. 245 (1975), which (it is respectfully submitted) should have been decided on the taxpayer's failure to sustain his burden of proof-by failing to evidence the nonassignability of the Irish Sweepstakes award won by minors which was subject to release on their reaching age 21 or by appropriate application. Instead, this Court, after noting that the record did not contain any evidence of the assignability of the award, stated that its decision would be the same whether or not the right to the funds were assignable. This Court has demonstrated in the past that it knows dicta when it sees it, cf. William H. Broderson, Jr., 57 T.C. 412 (1971). Therefore, without the fact of nonassignability in the record, this Court should not be bound by the dicta contained in the Pulsifer decision.

Finally, the question turns upon whether Joseph could freely assign his interest in the award during the period that his parents held such award under the custodian arrangement. Section 7.4.3 of the Estates, Powers and Trusts Law makes clear that the only means available for Joseph to obtain all or part of the award was either through the discretion of his parents or by an ex-parte petition to the Surrogate Court which

"may" order payment after review of the petition. Clearly, it would make a mockery of the Estates, Powers and Trusts Law if Joseph could do indirectly that which he could not do directly, i.e., assign his interest in the lottery award for cash to a third party while being unable to obtain such cash directly through the methods available under Section 7-4.3. Such a third party transfer would clearly subvert the law and be in complete contravention of the reasons for which Section 9553 authorized payment to the adult members of a minor's family pursuant to E.P.T.L. Section 7-4.

In a report on the Uniform Gift to Minors Act issued by the Subcommittee of the Committee on Estate and Tax Planning of the American Bar Association (See Vol. 103, No. 10, Trusts and Estates 983, October, 1964), the following conclusion is reached regarding the rights of creditors against minors who are beneficiaries under a custodian arrangement:

> "3. Creditors' Rights. As to the donor, the normal rules of fraudulent conveyances would seem to apply. As to the minor, the situation is not so clear. A minor can, with certain exceptions, incur no binding obligations before majority. If he does incur such obligations, (e.g., for necessities) some idea of the rights of his creditors can be determined by analogy to trust law applicable to support trusts.[38] Creditors having claims for necessaries are, in most states, allowed to reach the interest of beneficiaries of these trusts, so that it appears probable that almost any creditor having an enforceable claim against the minor may reach the custodial assets.[39]

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[38] Such an analogy might not be necessary, since any gift under the Act vests "indefeasible legal title" in the minor, Id. Sec. 3(a).

[39] 2 Scott, Trusts, Sec. 157.2, at 1115 (2d ed. 1956)."

It is clear that the most a creditor could obtain from the custodial award would be a claim for necessaries. New York, being the first state to adopt the Revised Uniform Gift to Minors Act (see "Practice Commentary", Patrick J. Rohan, preceding Sec. 7-4.1, McK. Cons. Laws of N.Y., Book 17B) would reasonably be expected to act in accordance with the conclusions reached in the cited extract from the American Bar Association Subcommittee. Further, reference is made to Joseph's 1970 Federal income tax return (Exh. 1-A), showing that Joseph received wages of $3,355 in that year; thereby evidencing that it would be reasonably unlikely that he would assign a portion of the lottery award to acquire necessaries-- his own wages would appear to be sufficient with respect thereto.

Finally, respondent makes reference to Gen. Obl. Law Sec 3-101 (Mckinney 1964), which states that an infant cannot disaffirm a contract made after age 18 where the contract was made in connection with a business in which the infant was engaged and was reasonable and provident when made. Clearly, this provision would have to yield to Section 7-4.1 of the Estates, Powers and Trusts Law which was framed so as to protect the minor from himself and to New York Lottery Law Section 9553, which authorized the custody arrangement presumably to thwart the free wheeling use of a lottery award (of $5,000 or more) by a minor. Gen. Obl. Law Sec. 3-101 assumes the unencumbered ownership of property and is not intended to contravene another law. Also, as Joseph's 1970 Federal income tax return discloses (Exh. 1-A), he was exclusively a wage earner in 1970 and not engaged in any business.

To conclude, respondent's argument that Joseph's unconditional right to receive the lottery award in 1971 gave rise, under the economic benefit doctrine, to his receipt of income in 1970, must fail since Joseph was a cash basis taxpayer in 1970, the lottery award was not subject to his full use and enjoyment nor capable of being assigned by him in whole or in part in 1970, and therefore his rights therein in 1970 were not equivalent to cash in that year. Reality, not labels, is the touchstone of realizing income under the provisions of the Internal Revenue Code. In 1970, Joseph could not use or enjoy the income represented by the lottery award unless his parents, in their discretion, allowed it or a Court, upon petition by Joseph so ordered it. Joseph could not, in 1970, manipulate the receipt of cash represented by the award by assigning his interest therein to a third party in derogation of the clear intent of the lottery law or the Estates, Powers and Trusts Law. Yes, Joseph had an unconditional right to receive the lottery award in 1971 when he reached majority, but that right, as demonstrated, was not equivalent to cash received by Joseph in 1970 under the economic benefit doctrine as set forth by the Supreme Court in Helvering v. Horst.

CONCLUSION

For the reasons stated herein and in Joseph's opening brief, it is respectfully submitted that the determination of the respondent should not be sustained and this Court should rule that the assessment proposed by respondent herein should not be made.

Respectfully submitted,

STANLEY PRESSMENT

Counsel for Petitioner,
Joseph Anastasio